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No. 84-1538

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

ALEXANDRA FISHER, MARGUERITE JACOBS, MORT BAKER, RICHARD LAWHORN and ANTHONY KERSHAW, individuals; and LEVIN-ZEMEL, a California corporation,
Appellants,

vs.

CITY OF BERKELEY, CALIFORNIA, a municipal corporation; BERKELEY CITY COUNCIL, and BERKELEY RENT STABILIZATION BOARD,
Appellees.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF CALIFORNIA

APPELLANTS' BRIEF

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QUESTIONS PRESENTED FOR REVIEW

1. Is a local ordinance which establishes ceilings on the price which property owners may charge for rental housing unconstitutional under the supremacy clause because it is in conflict with and thus preempted by the Sherman Act?

(a) Does the California Supreme Court's creation of a "public welfare" defense erroneously permit municipalities to give prevailing weight to their local concerns in defiance of specific congressional antitrust enactments which mandate a national pro-competition policy?

(b) May a municipality mandate landowners to fix rental rates in the absence of any clearly articulated and affirmatively expressed state policy and any active state supervision of the anticompetitive local program?

(c) Does the decision below fail to follow this Court's rulings which recognize that governmentally imposed vertical price maintenance is a per se violation of the Sherman Act and is thus unconstitutional under the supremacy clause?

d) Is a local rent control ordinance protected from preemption by existing state legislation which is, at best, neutral on the subject of rent control?[1]

PARTIES TO THIS APPEAL

Appellants Alexandra Fisher, Marguerite Jacobs, Mort Baker, Richard Lawhorn, and Anthony Kershaw, all individual rental property owners, and Levin-Zemel, a California corporation, were plaintiffs and appellants in the courts below.

Appellees City of Berkeley, California, a municipal corporation, the Berkeley City Council and the Berkeley Rent Stabilization Board, were defendants and appellees in the courts below. There were no other parties.

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[1] The jurisdictional statement also presented a due process question which was not accepted for consideration.

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APPELLANTS' BRIEF

Appellants Alexandra Fisher, Marguerite Jacobs, Mort Baker, Richard Lawhorn, Anthony Kershaw and Levin-Zemel, Inc. hereby submit their brief supporting their appeal.

OPINIONS BELOW

The opinion of the California Supreme Court is reported at 37 Cal.3d 644, 693 P.2d 261, 209 Cal.Rptr. 682 (1984). The opinion appears as Appendix A in the Jurisdictional Statement Appendix ("J.S. App. A").

The opinion of the California Court of Appeal was reported (until vacated) at 148 Cal.App.3d 267, 195 Cal.Rptr. 836 (1983). The opinion appears as J.S. App. B.

JURISDICTIONAL BASIS

a. Appellants filed suit for declaratory and injunctive relief in the Superior Court in and for the County of Alameda, State of California. The complaint sought, *inter alia*, a declaratory judgment that the Berkeley Rent Stabilization And Eviction For Good Cause Ordinance, Berkeley, California Ordinance 5261-N.S. (June 3, 1980) ("the Ordinance")[2] violated the Federal Constitution and an injunction against its enforcement. After initially enjoining enforcement of portions of the Ordinance, the superior court granted appellees' motion for judgment on the pleadings, declaring that the Ordinance was valid in all respects and ordering appellants to obey its mandates.[3] The California Court of Appeal, First Appellate District, Division Five, unanimously reversed the superior court and declared that the Ordinance was unconstitutional. After granting hearing, the California Supreme Court, in a 6 to 1 decision, reversed the court of appeal and sustained the validity of the Ordinance against appellants' constitutional attack.[4]

b. The judgment of the California Supreme Court was rendered on December 27, 1984. Appellants filed a timely notice of appeal in the California Supreme Court on March 18, 1985.[5]

c. Jurisdiction of this appeal lies in 28 U.S.C. § 1257(2), which provides for an appeal from a final judgment of a state's

[2] The Ordinance was amended in part in 1982 when Berkeley voters enacted the Tenants Rights Amendments Act of 1982 which is currently in effect. All references to the Ordinance are to the amended version which appears as J.S. App. G. Unless otherwise indicated, all references to "sections" are to sections of the Ordinance.

[3] The temporary restraining order, preliminary injunction and judgment on the pleadings appear as J.S. App. C, D and E, respectively.

[4] Two supreme court justices did not participate in the decision and were replaced by Los Angeles Superior Court judges who were assigned by the Chief Justice; the *pro tem* justices voted with the majority.

[5] A copy of the notice of appeal appears as J.S. App. F.

highest court "where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution . . . and the decision is in favor of its validity." Section 1257(2) applies where a municipal ordinance has been declared constitutional by a state's highest court. *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 207 n. 3 (1975); *King Mfg. Co. v. City Council of Augusta*, 277 U.S. 100 (1928); *Coates v. City of Cincinnati*, 402 U.S. 611, 612 (1971). This Court noted probable jurisdiction on May 28, 1985.

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The relevant Constitutional provisions are:

> Article VI, clause 2: This Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

The relevant statutory provisions are:

15 U.S.C. § 1: Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. . . .

15 U.S.C. § 35(a): No damages, interest on damages, costs, or attorney's fees may be recovered under section 15, 15a, or 15c of this title from any local government, or official or employee thereof acting in an official capacity.

Cal. Gov't Code § 65589 (Deering). Construction: (b) Nothing in this article shall be construed to be a grant of authority or a repeal of any authority which may exist of a local government to impose rent controls or restrictions on the sale of real property.

(c) Nothing in this article shall be construed to be a grant of authority or a repeal of any authority which may exist of a local government with respect to measures that may be undertaken or required by a local government to

be undertaken to implement the housing elements of the local general plan.

Cal. Health & Safety Code § 1518 (Deering). Rent Controls: (a) Nothing in this chapter shall authorize the imposition of rent regulations or controls for licensed community care facilities.

(b) Licensed community care facilities shall not be subject to controls on rent imposed by any state or local agency or other local government or entity.

Cal. Health & Safety Code § 50202 (Deering). Authority to Impose Rent Regulations or Controls: Nothing in this division shall authorize the imposition of rent regulations or controls except by a regulatory contract between the agency or the department, as the case may be, and its housing sponsor or developer, for housing units financed, insured, coinsured or otherwise assisted by the agency or by the department, as the case may be. Except for the federal government, the right to control rent on such units shall reside exclusively in the agency or the department, as the case may be, and the housing sponsor or developer so regulated shall not otherwise be subject to controls on rent imposed by any state or local agency or other local public entity.

Cal. Health & Safety Code § 51852.5 (Deering). Exemptions for Rental Housing Developments: Notwithstanding any other provision of law:

(a) Any rental housing development which is financed from mortgages insured pursuant to this chapter shall be exempt from all of the following: . . .

(2) Any rent control except for units made available to lower income households as provided pursuant to subdivision (a) of Section 51226 and subdivision (k) of Section 51852.

STATEMENT OF THE CASE

Appellants are small owners and operators of residential rental property within the City of Berkeley, California.[6] Berkeley is the site of a major university with a sizeable student population and tenants greatly outnumber rental property owners. *Birkenfeld v. City of Berkeley,* 17 Cal.3d 129 at 145-6, n. 14, 550 P.2d at 1010, 130 Cal.Rptr. at 474 (1976).

The history of rent control in Berkeley began with federal price controls during the Nixon Administration. As those controls were phased out, the tenant-dominated populace decided to impose its own brand of rent control.[7] To this end, a stringent rent control initiative was placed on the June 6, 1972 city election ballot and enacted by majority vote. Enforcement of that particular rent control law was enjoined by the superior court and, in 1976, declared unconstitutional by the California Supreme Court on due process grounds. *Birkenfeld v. City of Berkeley,* 17 Cal.3d 129, 550 P.2d 1001, 130 Cal. Rptr. 465 (1976).

The rent control movement was deterred only momentarily. Another rent control initiative was placed on the April 1977 Berkeley city ballot but was rejected by the voters after a bitter campaign.[8] However, in June 1978 the citizens of California enacted Proposition 13 which mandated real property tax reductions and spurred rent control enthusiasts to place another initiative, Measure I, on the very next ballot. On November 7, 1978, the Berkeley electorate passed Measure I, the Rental Property Tax Relief Ordinance. This law froze rents at their June 1978 levels and required landowners to pass on to their tenants 80% of their Proposition 13 tax savings by reducing rents for calendar year 1979.

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[6] During the fourth year of the litigation below, Appellant Alexandra Fisher declared bankruptcy and lost her four-unit building (in which she resided) to foreclosure. U.S. Dist.Ct. (N.D. Cal.) B.R. No. 484-01827 PW.

[7] Berkeley rent control theory can be traced to a document entitled "The City's Wealth, Programs for Economic Control in Berkeley" which described rent control as "community expropriation in favor of the tenants." (p. 21.) This document was authored by the Community Ownership Organizing Project and published by the Institute For Policy Studies, Wasington, D.C. in 1976.

[8] That initiative campaign resulted in a decision of this Court affirming campaign contributors' associational and speech righ . *Citizens Against Rent Control v. City of Berkeley,* 454 U.S. 290 (1981).

As Measure I was about to expire, the Berkeley City Council on November 27, 1979, enacted Ordinance 5212 entitled the Temporary Rent Stabilization Program; this law continued the rent freeze and permitted landowners to increase rents a maximum of 5% only if they demonstrated in writing (for tenant review) that such an increase was necessary to offset actual operating cost increases. Ordinance 5212 was an interim measure to control the price of rental housing during the period between the expiration of Measure I on December 31, 1979 and the June 3, 1980 city election. Section 10, J.S. App. G at A-122; copies of Measure I and Ordinance 5212 have been lodged with the Clerk of the Court simultaneously with the filing of this brief.

At the June 3, 1980 city election, the Berkeley electorate passed Measure D which is the Ordinance at issue here. Despite the raging inflation of the late 1970s, the Ordinance continued the price controls that had been in effect since June of 1978 and prohibited appellants and other landowners from raising rents without the express permission of the appellee Rent Stabilization Board ("the Board"). Violators of the price ceiling are subject to criminal prosecution. Section 19, J.S. App. G at A-139.

The Board is empowered under the Ordinance to authorize rent increases in just two circumstances: discretionary annual general adjustments and individual adjustments pursuant to an individual petition and administrative hearing process. Section 11, which governs annual general adjustments, permits (but does not require) the Board to grant annual city-wide rent increases to offset certain cost increases (i.e., utility rates, property taxes and operating and maintenance costs) but prohibits increases for any other reason including to offset the erosionary impact of inflation on June 1978 rental dollars. Section 12, which governs the individual petition process, allows an adjustment of the 1979 rental ceiling only when, in a formal administrative hearing, the landowner demonstrates by a preponderance of the evidence that an increase is necessary to provide "a fair return on investment." Section 12(c), J.S. App. G at A-129. Rent increases merely to pay for the amortization of capital improvements are likewise prohibited unless authorized via this cumbersome administrative hearing process. Even

when a tenant voluntarily vacates a unit, the rent of the new tenant cannot be raised. Section 10, J.S. App. G at A-122.

There are more than 23,000 privately-owned rental units in Berkeley which are subject to the Ordinance. Each unit must be registered annually by its owner with the Board; the registration form requires submission of detailed information under penalty of perjury concerning the rent history of the unit. Section 8, J.S. App. G at A-120. Annual registration fees, which were $12 per unit in 1980, are now $30 per unit and will be increased to $60 per unit by years' end. Section 8(d), J.S. App. G at A-121.

The asphyxiating effects of this restrictive regime on competition are obvious. Owners are prevented from competing by a self-interested tenant majority which has decided that price competition is to be displaced by regulation. A corollary effect is that those seeking to locate rental housing are prevented from competing with existing tenants. The Ordinance facially deprives owners (and prospective tenants) of the ability to engage in price competition and has a devastating effect on the housing supply which ultimately leads to the abandonment and/or elimination of rental housing.[9]

The questions presented by this appeal are properly before this Court. The supremacy clause preemption issues were raised initially in the state supreme court with that court's express permission, and were the focal point of the first 54

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[9] Indeed this has already occurred in Berkeley. The city council on December 31, 1984, enacted an urgency ordinance, Ord. 5626-N.S. § 5, 1984, which requires an owner of residential rental property to obtain a removal permit before taking his or her units off the rental market by demolition, condominium conversion or similar approach. No permit may be issued if removal would adversely affect the city's housing supply or if the controlled unit is occupied or occupiable by persons of very low, low or moderate income. The enactment of this law is tantamount to an admission that price control forces owners out of the rental market and thereby diminishes supply and competition. Indeed the city council's findings specifically state:

> During the past several months the council has noted a significant increase in the number of applications for issuance of permits which would have the direct or indirect result of authorizing the removal of units from the rental housing market. Many of such projects have already received preliminary permit approvals. In order to prevent the further loss of rental housing units through conversion or

(footnote continued on following page)

pages of the slip opinion below. J.S. App. A at A-1 through A-35. "There can be no question as to the proper presentation of a federal claim when the highest state court passes on it." *Raley v. Ohio*, 360 U.S. 423, 436 (1959). *See also, Ocala Star-Banner Co. v. Damron*, 401 U.S. 295, 299 n. 3 (1971); *Ward v. Village of Monroeville*, 409 U.S. 57, 61 (1972); *Orr v. Orr*, 440 U.S. 268, 274-275 (1979). Jurisdiction also resides in this Court where the federal question is raised below but the state court failed to decide it. *Chambers v. Mississippi*, 410 U.S. 284, 290 n. 3 (1973).

SUMMARY OF ARGUMENT

Appellee City of Berkeley has enacted a rent control ordinance which stabilizes or fixes the price at which 23,000 private rental units in the City may be rented to the public. This Ordinance not only bans, but criminalizes free and open price competition in the private rental market; it subordinates the strong national policy in favor of price competition for the sole purpose of shifting wealth to a favored political constituency — current occupants of the city's rental housing. Few, if any, municipal programs are more hostile to the nation's antitrust policies than price-fixing.

Price competition is the most important component of federal antitrust policy, *National Society of Professional Engineers v. U.S.*, 435 U.S. 679 (1978); indeed, under Section 1 of the Sherman Act, 15 U.S.C. § 1, combinations and programs which fix or stabilize prices are ruled illegal per se without need for further examination of anticompetitive effects and without regard for any alleged public benefit or public welfare justifications for such price control. *U.S. v. Socony-Vacuum Oil Co.*, 310

(footnote continued from preceding page)

> demolition, and to protect the public welfare, it is necessary that this chapter take effect immediately.

A copy of this Ordinance has been lodged with the Clerk of the Court.

A *New York Times* article recently reported similar effects of that city's rent control law:

> The supply of rental housing in New York is being eroded from several directions at once. At the top, cooperative apartments nearly doubled between 1977 and 1983, to 271,000. At the bottom, tens of thousands of apartments have been abandoned . . .

N. Y. Times, June 4, 1985, at B 1; Matthew L. Wald.

U.S. 150 (1940); *Arizona v. Maricopa County Med. Soc'y.* 457 U.S. 332 (1982).

The California court below disregarded this Court's uniform condemnation of price-fixing and ruled that the per se standard of invalidity did not apply to a municipal rent-fixing program. The court below was patently in error. In the context of a preemption challenge (as in the case at bench), the per se illegal nature of price-fixing has been recognized as the most important criterion in finding that a non-immune government program to stabilize prices is in direct conflict with the Sherman Act and hence preempted thereby. *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97 (1980) (hereinafter "*Midcal*"); *Goldfarb v. Virginia State Bar*, 421 U.S. 773 (1975); *Schwegmann Bros. v. Calvert Distillers Corp.*, 341 U.S. 145 (1968) (hereinafter "*Schwegmann*"). While not all potentially anticompetitive local governmental regulations run afoul of federal antitrust laws, *Rice v. Norman Williams Co.*, 458 U.S. 654 (1982), those which fix or stabilize prices do. In the case at bench, Berkeley has made price-competition a crime; that creates a direct conflict between the Berkeley rent control ordinance and Section 1 of the Sherman Act. As such the Ordinance is preempted and unconstitutional under the supremacy clause.

Under principles of federalism, this Court has recognized that Congress did not intend for its antitrust statutes to unduly restrict the sovereign regulatory powers of the states. Standards have carefully been developed to identify circumstances under which state and local governmental action may be exempt from federal antitrust restrictions. The state action antitrust exemption meticulously balances national antitrust policy with the interests of the sovereign states in enacting certain specific regulatory programs which displace free and open competition.

States, as sovereigns, may enact such regulatory programs themselves, *Parker v. Brown*, 317 U.S. 341 (1943); *New Motor Veh. Bd. of California v. Orrin W. Fox Co.*, 439 U.S. 96 (1978), or they may specifically authorize municipalities to pursue such programs. *Town of Hallie v. City of Eau Claire*, 53 U.S.L.W. 4418 (March 27, 1985) (hereinafter "*Town of Hallie*"). Thus,

if rental price stabilization is viewed by the California legislature as being important to the public interest and welfare, it could, itself, enact a regulatory scheme which replaces market competition with regulation. Similarly, the legislature could "clearly articulate and affirmatively express" a state policy authorizing rent control by municipalities.

However, it is clear that the California legislature has not adopted a state policy authorizing rent control in any form. There is no direction whatsoever by the sovereign to replace price-competition with a regulatory regime governing the private rental unit market.

This Court has been clear in consistently ruling that without such a state sovereign policy decision, municipalities may not, on their own, disregard federal antitrust laws and policies. *City of Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389 (1978) (hereinafter "*Lafayette*"); *Community Communications Co. v. City of Boulder*, 455 U.S. 40 (1982) (hereinafter "*Boulder*"). Indeed, under such circumstances, municipalities must abide by federal antitrust laws. There are tens of thousands of local governmental units nationwide. It would create an intolerable interference with national antitrust policy if each of these governmental entities were empowered to enact anticompetitive ordinances to pursue some real or imagined temporary local interest. The proper forum for protecting and promoting such local interests is the state Legislatures which are able to utilize their sovereign power to implement regulatory programs of statewide applicability and provide adequate safeguards against anticompetitive abuses which are unnecessary to the accomplishment of the sovereign's regulatory purposes.

The ruling of the California court below erroneously creates a new "public welfare defense" for municipalities' violations of antitrust law and policy. Under the law of preemption, it is unheard of for a local government to urge the importance of its parochial interest as a defense to supervening federal statutory policy. The California court also ruled that price-fixing by a municipality was not a per se violation of the Sherman Act. This was clearly erroneous in light of *Midcal* where this Court ruled that non-immune state price stabilization

programs were per se violations, hence in direct conflict with Section 1 of the Sherman Act.

In the context of our case, the California Supreme Court's refusal to apply the per se rule to municipal price-fixing has the effect of creating antitrust immunity for cities. It allows cities, acting with no direction (much less, authorization) from the state, to fix prices with resultant impacts on the market far more crippling to national antitrust policy than the situations presented to this Court in *Midcal, Lafayette* or *Boulder*.

Viewed from any perspective, it must be recognized that the Berkeley Ordinance stabilizing prices on 23,000 private rental units is in direct conflict with and preempted by Section 1 of the Sherman Act and must be held unconstitutional under the supremacy clause.

ARGUMENT

I. THE BERKELEY RENT CONTROL ORDINANCE IS NON-IMMUNE LOCAL GOVERNMENTAL ACTION WHICH CONFLICTS WITH FEDERAL ANTITRUST LAWS AND POLICIES

Appellants here challenge the legality of a municipality's enactment of an ordinance which fixes the prices at which private property owners may rent or lease their property. This Court has been clear in its rulings that municipalities are not immune from the Sherman Act or any other federal antitrust statute. *Lafayette; Boulder*. In particular, it has specifically and expressly recognized that non-immune governmental action, such as the Berkeley Ordinance here, which fixes prices at which private parties provide services or commodities to the public, is in direct conflict with Section 1 of the Sherman Act. 15 U.S.C. § 1; *Goldfarb v. Virginia State Bar*, 421 U.S. 773 (1975); *Midcal*, 445 U.S. 97 (1980).

Because the antitrust laws stand as the bulwark of this nation's economic viability, the Court has cautioned against any casual grant of immunity from their coverage. "Antitrust laws in general and the Sherman Act in particular, are the Magna Carta of free enterprise. They are as important to the preservation of economic freedom and our free-enterprise system as the

Bill of Rights is to the protection of our fundamental personal freedoms." *Midcal,* 445 U.S. at 110-111 *quoting United States v. Topco Associates, Inc.,* 405 U.S. 596 (1972).

Exemptions from these important federal procompetition policies are to be strictly and narrowly construed. *National Gerimedical Hospital v. Blue Cross of Kansas City,* 452 U.S. 378, 388 (1981); *Group Life & Health Ins. Co. v. Royal Drug Co.,* 440 U.S. 205, 231 (1979). Such construction reflects the recognition of the "indispensable role of antitrust policy in the maintenance of a free economy." *United States v. Philadelphia National Bank,* 374 U.S. 321, 348 (1963). In a line of uniform decisions, this Court has consistently refused to permit local governmental agencies to utilize their "public" character to pursue temporary parochial interests to the detriment of the enduring national policy favoring free and open competition in the marketplace. *Lafayette; Boulder;* and most recently, *Town of Hallie,* 53 U.S.L.W. 4418 (1985). *Compare: Parker v. Brown,* 317 U.S. 341 (1943) (hereinafter "*Parker*").

Relying on principles of federalism and state sovereignty, *Parker* delineated the "state action" exemption from federal antitrust laws in a case where an anticompetitive policy was pursued by state officers and agents at the specific direction of the state legislature. In *Parker,* this Court recognized that state action affecting the production of raisins produced in California was anticompetitive, and that Congress, in the exercise of its commerce power, could prohibit a state from maintaining such a program. Nevertheless, this Court ruled that Congress in its antitrust legislation, did not intend to prohibit such regulatory programs enacted by the state in its sovereign capacity. *See Southern Motor Carriers Rate Conference, Inc. v. United States,* 53 U.S.L.W. 4423, 4424 (March 27, 1985) (hereinafter "*Southern Motor Carriers*").

Parker and its progeny are uniform in finding state action immunity only in those instances where the anticompetitive conduct is undertaken by the state itself, or at its direction. Specifically, municipalities have no sovereign power and cannot, on their own initiative, advance their parochial interests through practices (such as price-fixing) which necessarily conflict with the pro-competition policies of federal antitrust laws.

Lafayette, 435 U.S. at 412-413; *Boulder,* 455 U.S. at 50-51. Indeed, Berkeley's rent-fixing ordinance can be shielded from federal antitrust scrutiny if, and only if, it was enacted pursuant to a "clearly articulated and affirmatively expressed" policy promulgated by the State of California in its sovereign capacity. *Lafayette,* 435 U.S. at 410-13; *Boulder,* 455 U.S. at 51-55.

Moreover, where, as here, the municipality is regulating and mandating private anticompetitive conduct, there must be supervision by the state sovereign. *Midcal,* 445 U.S. at 105. As this Court observed in *Town of Hallie,* 53 U.S.L.W. at 4421 n. 10: "Where state or municipal regulation of a private party is involved, however, active state supervision must be shown, even where a clearly articulated state policy exists." *See Southern Motor Carriers,* 53 U.S.L.W. at 4423.

The California Supreme Court, however, ignored this body of law. It ruled that price-fixing programs when created by a municipality (as opposed to private parties) were not to be measured by the per se standard, *Fisher v. City of Berkeley,* 37 Cal.3d 644, 667-71, J.S. App. A at A-21-26, and that municipalities acting on their own, without enabling state legislation or supervision, could assert a "public welfare" defense to any conflict with or violation of the Sherman Act. *Id.* at 673, J.S. App. A at A-28.

The California Supreme Court's ruling is patently wrong. *First,* this Court has consistently recognized that price-fixing programs are per se violations of Section 1 of the Sherman Act even if they are implemented by non-immune governmental action. *Midcal* and numerous other cases have uniformly condemned price-stabilization even where authorized or approved by state governmental agencies. *A fortiori* such a program mandated by mere municipal ordinance, as in our case, must give way to supervening federal law and policy.

Second, the evil effects of price-fixing in the marketplace are not diminished by the fact that such are promoted by municipal, rather than private conduct. Indeed, a governmentally mandated program is worse in that it includes a penal enforcement mechanism rather than being dependent on mere

informal private compliance. The massive anticompetitive impacts of the Ordinance here challenged are clear in that virtually every residential rental unit in the city is unequivocally compelled to comply with the ban on price competition under threat of criminal prosecution.

Third, the *Parker* " state action" exemption standards are relevant to preemption challenges of local laws as well as direct federal antitrust actions against municipalities. Indeed, *Parker* itself was a preemption case. *Lafayette* and *Boulder* are instructive as to an inquiry into Congressional intent pursuant to preemption analysis. As *Lafayette* made clear the word "exemption" is merely "a shorthand expression" for whether the Sherman Act was "intended by Congress to prohibit the anticompetitive restraint" imposed by municipalities. *Lafayette,* 435 U.S. at 393 n. 8. Thus a municipal ordinance which conflicts with the Sherman Act is preempted unless it was enacted pursuant to a clearly articulated and affirmatively expressed state law and there existed active state supervision of the anticompetitive private conduct mandated by that ordinance. This Court's ruling from *Parker* to *Town of Hallie* indicate that if a state or local anticompetitive program meets the state action exemption criteria, then Congress did not intend for the Sherman Act to apply. Hence, there would be no conflict between the federal statute's intended coverage and the local law. However, if the state action exemption requirements are not met, as in the case at bench where the court below acknowledged that California had no state rent control statute, then there is no immunity from antitrust laws, and the federal statutes, policies and standards take precedence over whatever conflicting local interests are sought to be advanced by the municipality involved.

Thus, when the California Supreme Court refused to apply the traditional federal per se illegality standards to the Berkeley rent-stabilization program, and, instead, carved out a "public welfare" defense for municipal programs, it in effect permitted municipalities to elevate their parochial local interests above important national antitrust policy, a result this Court strongly condemned in *Lafayette* and *Boulder.*

It is instructive that this Court's rulings circumscribing the scope of state action immunity for municipalities have recently been endorsed by congressional action. Following *Boulder* and *Lafayette,* there echoed in some circles an argument that those decisions would paralyze local governments and prevent their functioning. Although this argument was soundly rejected by this Court, its proponents renewed their efforts with intense lobbying efforts in Congress seeking effectively to overturn *Boulder* and *Lafayette.* However, in the Local Government Antitrust Act of 1984, 15 U.S.C. § 35, Congress rejected proposals which would have conferred broad antitrust immunity on official action by local governments.[10] Instead, Congress left unchanged this Court's unequivocal rulings that the state action immunity applies only to the state acting in its sovereign capacity or municipalities acting with the state's clear authorization.

The Local Government Antitrust Act of 1984 does not immunize municipal anticompetitive practices nor relieve them from scrutiny under traditional antitrust standards (such as the per se rule), but merely provides that the remedy of damages shall not be applicable to antitrust actions against local governments or to private parties acting pursuant to local governmental mandate. 15 U.S.C. § 35(a). In so doing, Congress rejected the notion that cities may disregard this nation's commitment to vigorous competition, affirmed the holdings of *Boulder* and *Lafayette* and responded to the legitimate concerns expressed by the dissents in those cases that exposing cities to antitrust damage actions would threaten their financial stability.[11]

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[10] In light of the California Supreme Court's ruling, it is particularly worth noting that Congress considered and rejected a proposal that would have exempted from antitrust scrutiny anticompetitive municipal conduct undertaken pursuant to a city's police powers. H.R. 5992, § 3, 98th Cong. 2d Sess. (1984), would have exempted municipalities from antitrust liability based on acts of government "reasonably undertaken to protect or provide for the public health, safety or welfare." Undaunted, the court below created its "public welfare" defense anyway.

[11] House Report, H.R. 98-965, articulates the Congressional reasoning for rejecting broad immunities for municipalities from the antitrust laws:

(footnote continued on following page)

The recent federal legislation and the body of law which this Court has carefully developed in defining the state action exemption from federal antitrust law has properly determined the balance which must be struck between national antitrust policy and local concerns. If something, such as the rent control program herein, is seen as an important and crucial local need, it can be implemented by a state legislative policy determination. The state may establish a regulatory regime to replace open competition in the rental market. If, however, as in the instant case, the state, as sovereign, has not identified rental price stabilization as necessary for the health, safety and welfare of its citizens, then a municipality may not take it upon itself to supersede the values of price competition which the Sherman Act requires. To allow such unauthorized municipal price-fixing, as urged by appellees below, would render the Sherman Act impotent to counteract many of the most equegious anticompetitive restraints that could be imposed by municipal government, effectively standing the supremacy clause on its head.

Appellants will show that the Ordinance must be invalidated because:

(a) It mandates price stabilization, a per se violation of Section 1 of the Sherman Act, and is, therefore, preempted under the supremacy clause;

(b) The Supreme Court of California, itself, acknowledged that "California has no state rent control statute." 37 Cal.3d at 655, J.S. App. A at A-6. Accordingly, there is no

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(footnote continued from preceding page)

The Subcommittee did not adopt the concept of a ban against private actions aimed at municipalities and their officials. The role of "private attorneys general" in the antitrust enforcement scheme remains central. *If Congress were confident that the actions of local governments and their officials were always in the public interest or would never work unnecessary anticompetitive injury, it could simply exclude them from the application of the antitrust laws entirely. The record does not support such action at this time.* The record does support, however, the notion that municipalities—and their taxpayers who must ultimately shoulder the burden—should not be subject to punitive sanctions in the form of treble damages. [*Id.* at 18; emphasis added.]

"clearly articulated and affirmatively expressed" policy of the State of California, as sovereign, to displace competition with regulation, pursuant to which the rent control ordinance may be validly enacted or immunized from federal antitrust preemption; additionally, the State of California, as sovereign, exercises no state supervision whatsoever over Berkeley's stringent regulation of private rental prices;

(c) The Court below erred in ignoring the governing standards established by this Court for assessing the propriety of municipal anticompetitive regulations and in creating its own "new" test for determining circumstances under which parochial local "public welfare" considerations constitute a "defense" to a claim of federal antitrust preemption. 37 Cal.3d at 673, J.S. App. A at A-28.

II. THE BERKELEY RENT CONTROL ORDINANCE IS PREEMPTED BY SECTION 1 OF THE SHERMAN ACT

Appellants here did not bring an antitrust suit for damages against the City of Berkeley and need not meet all of the technical requirements for maintaining a private action for price-fixing under Sections 4 and 16 of the Clayton Act. 15 U.S.C. § § 15, 26. Rather, this is a preemption challenge in which appellants claim that the Ordinance is in conflict with federal antitrust law and policy. As it was explained in this context to the U.S. Senate Judiciary Committee by noted antitrust authority Professor Phillip Areeda:

> It is exceedingly important to see that neither antitrust liability nor antitrust damages are necessary to hold, in any particular case, that the federal antitrust regime applies in preference to a federal or state regulatory effort. This is perfectly obvious at the federal level where, for example, a federal court may "invalidate" the regulation or decision of a federal agency because it interferes with competition more than Congress intended and is therefore beyond the authority of the officials in question. Such conclusions are routinely reached without any finding that the federal agency or its officials have violated the antitrust laws or are liable for antitrust treble damages.

Testimony of Phillip Areeda, Official Proceedings of the United States Senate Judiciary Committee, June 30, 1982.

Under the appropriate standards, a municipal ordinance is preempted by federal law and is unconstitutional under the supremacy clause if it "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Hines v. Davidowitz,* 312 U.S. 52, 67, (1941); *see also: Nash v. Florida Industrial Comm'n.,* 389 U.S. 235, 239 (1967); *Jones v. Rath Packing Co.,* 430 U.S. 519, 526 (1977). As Professor Laurence H. Tribe has stated:

> [S]tate and federal laws need not be contradictory on their face for the latter to supersede the former; there are more subtle forms of actual conflict. Even if state action does not go so far as to prohibit the very acts which the federal government requires (or vice versa), it may nonetheless be struck down if it is in "actual conflict" with the objectives that underlie federal enactments. Thus, state action must be invalidated if its effect is to discourage conduct that federal action seeks to encourage.

L. Tribe, *American Constitutional Law,* § § 6-24 (Foundation Press, 1978).

The issue for the Court is thus squarely put: Does the Berkeley Ordinance which sets and fixes rental prices and which denies property owners' the freedom to change prices discourage price competition which the federal antitrust laws seek to encourage? The answer, appellants submit, is self-evident.

Under penalty of criminal prosecution, the Ordinance facially prohibits property owners from determining competitively the price at which they should rent their premises. As such it directly contravenes the important commitment to price competition as a national economic policy. Federal antitrust laws, particularly Section 1 of the Sherman Act, prohibit any program or combination which has the purpose and effect of "raising, depressing, fixing, pegging or stabilizing . . ." prices. *United States v. Socony-Vacuum Oil Co.,* 310 U.S. 150, 223 (1940). The Berkeley rent control regulation is such a program in that is depresses, pegs and stabilizes rental prices for

residential property. Berkeley's rent-fixing program thus directly conflicts with federal antitrust law and policy, and clearly stands as an obstacle to the accomplishment and execution of the congressional policy favoring price competition. This showing is more than sufficient to invalidate the Ordinance under traditional preemption analysis.

This Court has consistently recognized the anticompetitive impact of governmentally imposed price-fixing and firmly held that such mandated price-fixing is in conflict with Section 1 of the Sherman Act unless immunized by the "state action" exemption of *Parker,* 317 U.S. 341. Thus, in *Schwegmann,* 341 U.S. at 389, this Court stated: "[W]hen a state compels retailers to follow a parallel price policy, it demands private conduct which the Sherman Act forbids . . ." More recently in *Midcal,* this Court considered whether the Sherman Act preempted California's resale price maintenance and price posting statutes applicable to the sale of wine. It ruled that a governmentally imposed vertical price-fixing scheme is subject to the illegal per se analysis under the Sherman Act unless such price-fixing is accomplished pursuant to a clearly articulated and affirmatively expressed state policy and is actively supervised by the state itself. 445 U.S. at 105 *citing Lafayette,* 435 U.S. at 410. In *Midcal,* even though there was a clearly articulated and affirmatively expressed state statutory policy favoring vertical resale price maintenance, this Court nevertheless held the state program to be preempted under a per se illegality analysis of the Sherman Act, because the state did not actively supervise the program. 445 U.S. at 105-106.

Of course, not every non-immune state or local regulation which may have some anticompetitive effect is preempted by federal antitrust laws. In *Rice v. Norman Williams Co.,* 458 U.S. 654 (1982) (hereinafter "*Rice*"), Mr. Justice Rehnquist noted that a hypothetical or potential conflict between federal and state regulatory schemes may not be sufficient to warrant preemption. In *Rice,* the court upheld a California "designation statute" which gave liquor distillers the right to designate which wholesalers may import the distiller's product into the state. The state law thereby enforced the distiller's decision to restrain unauthorized wholesalers from bringing its products

into California and engaging in intrabrand competition with authorized wholesalers.

The Court observed that the practice of manufacturers in restricting the vertical distribution of their products is not a per se violation of the Sherman Act, citing *Continental T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36, 57-59 (1977) (hereinafter *"GTE Sylvania")* which recognized that *non-price* vertical restrictions on product distribution may reasonably encumber intrabrand competition in order to promote interbrand competition. Under *GTE Sylvania,* then, such non-price vertical restrictions in some circumstances may well be valid under a rule of reason analysis of the Sherman Act, by stimulating more effective interbrand competition. *Rice,* 458 U.S. at 661-662. Thus, in *Rice,* the Court could not find that the California "designation statute" would be facially and "in all cases" in conflict with Section 1 of the Sherman Act.

On the other hand, Mr. Justice Rehnquist distinguished cases such as ours where the state or local governmental regulation mandated price maintenance which has historically been held to be a per se violation. *Id.* at 659, citing *Midcal.* The Court went on to recognize that non-immune state or local programs are facially preempted by Section 1 of the Sherman Act when the conduct mandated (such as rental price stabilization here) is a per se violation. *Id.* at 661. Indeed, all price competition in the Berkeley rental market is interdicted by the Ordinance here challenged. The case at bench, then, is not similar to *Rice, Exxon Corp v. Governor of Maryland,* 437 U.S. 117 (1978) (hereinafter "*Exxon*"), or *Joseph E. Seagram & Sons, Inc. v. Hostetter,* 384 U.S. 60 (1966) which involved merely "potential conflicts" with federal antitrust laws "entirely too speculative . . . to warrant pre-emption . . . ." *Exxon,* 437 U.S. at 130-131, but rather a direct collision with the price competition mandate of Section 1 of the Sherman Act.[12]

As will be shown below, the Berkeley rent control ordinance is not merely a regulation which has some anticompeti-

[12] *Exxon,* moreover, involved a state's attempt, via a clearly articulated state statute, to prevent oil companies from engaging in discriminatory pricing practices in a manner wholly consistent with the policies of the Robinson-Patman Act. *Exxon,* 437 U.S. at 132-33.

tive effects and which creates only a speculative or hypothetical conflict with federal antitrust statutes; rather it prohibits price competition, the most essential component of federal antitrust policy. Such price stabilization programs are so pernicious in thwarting competition in the marketplace that they are invariably ruled to be in violation of or in conflict with Section 1 of the Sherman Act. The "public" nature of this price-fixing scheme in no way diminishes the adverse anticompetitive effects traditionally found in programs which interfere with prices. The harmful impacts on competition and on interstate commerce generated by Berkeley's rent control ordinance require the conclusion that the Ordinance directly conflicts with the Sherman Act.

A. The Berkeley Ordinance Mandates The Fixing And Stabilizing Of Rental Prices And Is Illegal Per Se Under Section 1 Of The Sherman Act.

This Court has never wavered in its view that price-fixing combinations are illegal per se under Section 1 of the Sherman Act. Restriction of price competition strikes at the very foundation of our federal antitrust policies. As this Court recognized in *National Society of Professional Engineers v. United States,* 435 U.S. 679, 692 (1978):

> Price is the "central nervous system of the economy," *United States v. Socony Vacuum Oil Co.,* 310 U.S. 150, 226 n. 59, and an agreement that "interfere[s] with the setting of price by free market forces" is illegal on its face. *United States v. Container Corp. of America,* 393 U.S. 333, 337.

For this reason, it is not necessary for courts to inquire into the reasonableness, nor the good motives, nor the alleged advancement of a public interest which are often put forward to justify the tampering with prices. As stated in *United States v. Socony-Vacuum Oil Co.,* 310 U.S. at 218:

> Thus for over forty years this Court has consistently and without deviation adhered to the principle that price-fixing agreements are unlawful per se under the Sherman Act and that no showing of so-called competitive abuses or evils which those agreements were designed to eliminate or alleviate may be interposed as a defense.

Price-fixing and price restricting programs violate the Sherman Act without regard to so-called "public welfare defenses" and with no need to demonstrate specific anticompetitive impact on the economy or the marketplace. Price tampering and price stabilizing programs, such as Berkeley's rental price regulation are so contrary to federal procompetition policies that they are presumed illegal with no further inquiry. *See Midcal,* 445 U.S. 97. And this per se illegality is not diminished because a program or combination sets maximum rather than minimum prices (i.e., depresses prices or keeps them lower). *Arizona v. Maricopa County Med. Society,* 457 U.S. 332 (1982); *Albrecht v. Herald Co.,* 390 U.S. 145 (1968). Moreover, the fact that the price-fixing program is organized and mandated by governmental regulation does not save it from per se illegality. "[W]hen a state compels retailers to follow a parallel price policy, it demands private conduct which the Sherman Act forbids." *Schwegmann,* 341 U.S. at 389; *Midcal.*[13]

It cannot be denied that the Berkeley Ordinance creates a program and combinations which directly prohibit price competition. The rent fixing program vertically mandates that landowners stabilize the prices at which they rent their property and this, in turn, precludes horizontal price competition with respect to the 23,000 rental unit market. Section 10, J.S. App. G at A-122. The inevitable result is that, horizontally, price competition among landowners in Berkeley is improperly eliminated. *See, e.g., Midcal,* 445 U.S. at 103; *Albrecht v. Herald Co.,* 390 U.S. 145 (1968); *United States v. Parke, Davis & Co.,* 362 U.S. 29 (1960) and *Dr. Miles Medical Co. v. John D. Park & Sons Co.,* 220 U.S. 373, 384 (1911) (vertical price-fixing destroys horizontal price competition as effectively as if the rental property owners "formed a combination and endeavored to establish the same restrictions . . . by agreement with each other.") Moreover, such municipal price-fixing has absolutely no pro-competitive impacts.

[13] *Midcal* and *Schwegmann* invalidated regulatory price maintenance programs involving the sale of liquor, an activity particularly entrusted to state control by virtue of the Twenty-First Amendment to the United States Constitution. There is even less justification for local governmental price regulation of other goods and services such as is involved in the case at bench.

The prohibition on price adjustments also prevents adjustment of "non-price" features of a product, service or commodity. In housing, for example, price-fixing virtually eliminates esthetic improvements, security services and other 'quality' features through which landowners could compete. Thus, any diversity and innovation in the rental housing market are sacrificed in the pursuit of low prices. But, as this Court recently stated, the antitrust laws are "grounded on faith in price competition as a market force and not on a policy of low selling prices at the price of eliminating competition." *Arizona v. Maricopa County Medical Society,* 457 U.S. 332, 348 (1982), *quoting* Rahl, "Price Competition and the Price Fixing Rule — Preface and Perspective," 57 N.W.U.L.Rev. 137, 143 (1962). A low price is, after all, not the sole objective either of consumers or of Congress, and elimination of price competition in pursuit of that parochial interest is beyond the constitutional capacity of the City of Berkeley. *Lafayette,* 435 U.S. at 408; *Boulder,* 455 U.S. at 50-51. As this Court recognized in *National Society of Professional Engineers v. U.S,* 435 U.S. at 695:

> The assumption that competition is the best method of allocating resources in a free market recognizes that all elements of a bargain — quality, service, safety, durability — and not just the immediate cost, are favorably affected by the free opportunity to select among alternative offers. Even assuming occasional exceptions to the presumed consequences of competition, the statutory policy precludes inquiry into the question whether competition is good or bad.

The opinion below, however, disregards decades of precedent by this Court, criticizes as "arbitrary" and "mechanical" the characterization of price-fixing as illegal per se and concludes that the per se rule of illegality does not apply to a municipal defendant's price-fixing ordinance. 37 Cal.3d at 651, J.S. App. A at A-1. The California Supreme Court cited *Broadcast Music, Inc. v. CBS,* 441 U.S. 1 (1979) as supporting this premise. 37 Cal.3d at 666, J.S. App. A at A-19. However, *Broadcast Music* is wholly different from the instant case. There, this Court observed that "blanket licensing" agreements

protecting copyrighted music were proper in light of previous stipulated consent decrees. *Id.* at 11-12 and 20. Of even greater significance was the fact that Congress, in the Copyright Act of 1976, 17 U.S.C. § § 111(d)(5)(A), 116(c)(4) and 118(b), authorized the use of blanket licensing practices as a means of preventing unauthorized use of copyrighted material. *Broadcast Music,* 441 U.S. at 15-16. There is no similar congressional approval of local rent controls or price fixing. The California court thus summarily and erroneously rejected the carefully evolved wisdom of this Court's rulings in *Midcal, Schwegmann, Lafayette* and *Boulder.*

The Ordinance is purely and simply a non-exempt, non-immune price fixing scheme which is in direct conflict with, and unlawful *per se* under Section 1 of the Sherman Act. In *Rice,* 458 U.S. at 659-60, this Court observed that in cases such as *Midcal* (and the case at bench), a governmentally imposed vertical price maintenance program *does* facially conflict with the Sherman Act because such price maintenance is "an activity that has long been regarded as a per se violation of the Sherman Act." And, as *Lafayette* and *Boulder* make clear, the circumstances under which *local* action may be preempted by the Sherman Act are considerably broader than in the case of *state* programs such as were examined in *Midcal* and *Rice.* The state court below disregarded *Schwegmann, Midcal* and *Rice* in refusing to apply a per se illegality analysis to the municipal rent-fixing ordinance and in refusing to find that control of price competition was facially inconsistent with and preempted by the Sherman Act.

B. Berkeley's Control Of Rental Prices Has Widespread And Far-Reaching Anticompetitive Impacts.

Appellees' price-fixing law eliminates price competition and flaunts the congressional policy of free competition. It thus represents "nothing less than a frontal assault on the basic policy of the Sherman Act." *National Society of Professional Engineers,* 435 U.S. at 695.

> The Sherman Act was designed to be a comprehensive charter of economic liberty aimed at preserving free and unfettered competition as the rule of trade. It rests on the premise that the unrestrained interaction of competitive forces will yield the best allocation of our economic resources, the lowest prices, the highest quality and the greatest material progress, while at the same time providing an environment conducive to the preservation of our democratic political and social institutions. But even were that premise open to question, the policy unequivocally laid down by the Act is competition."

Northern Pacific Ry. Co. v. United States, 356 U.S. 1, 4 (1958).

The widespread anticompetitive impacts brought about by pervasive rental price control demonstrate the economic evils which result from such a program and require application of the per se illegality rule. It is beyond dispute that had the owners of the 23,000 rental units in Berkeley combined, on their own, to stabilize collectively the rental prices of their premises, such would violate the Sherman Act. The anticompetitive impact on the marketplace is identical where—as here—the same price stabilization is accomplished by municipal ordinance.

Local rent control ordinances result in a crazyquilt of local price-fixing programs (more than 50 in California alone); there is no justification in law or policy for permitting such an anticompetitive balkanization to exist simply because it is politically expedient within a particular municipality. As stated in *Lafayette,* 435 U.S. at 412-413:

> In light of the serious economic dislocation which could result if cities were free to place their own parochial interests above the Nation's economic goals reflected in the antitrust laws, we are especially unwilling to presume that Congress intended to exclude anticompetitive municipal action from their reach. (Citation omitted.)

The serious "economic dislocation" which this Court warned against in *Lafayette* is an inevitable effect of local rent control. Justice Lucas in his dissent, below, 37 Cal.3d at 715-16, J.S. App. A at A-83-84, incisively described the myriad anticompetitive evils spawned by such programs:

> Economists are virtually unanimous in their condemnation of rent control laws. (E.g., Baird, *Rent Control: The Perennial Folly* (1980) pp. 54-78; *Rent Control, A*

Popular Paradox (The Fraser Institute edit. 1975) [essays by nine economists]; Muth, *Redistribution of Income Through Regulation in Housing* (1983) 32 Emory L.J. 691, 698; see also Rabin, *The Revolution in Residential Landlord-Tenant Law* (1984) 69 Cornell L.Rev. 517, 555 [quoting Ludwig von Mises' conclusion that governmental attempts to fix the price of a commodity make conditions worse].) In the view of most of these economists, rent control schemes cause what a Supreme Court plurality has called "serious economic dislocation." (See *Lafayette, supra,* 435 U.S. at pp. 412-413.)

. . . .

As previously indicated, just as maximum pricing of goods and services generally discourages entry into the market (see *Maricopa, supra,* 457 U.S. at p. 348), maximum rents have a negative impact on the production of new housing (Hirsch, *From "Food for Thought" to "Empirical Evidence" About Consequences of Landlord-Tenant Laws* (1984) 69 Cornell L.Rev. 604, 609-610; Siegan, *Commentary on Redistribution of Income Through Regulation in Housing, supra,* 32 Emory L.J. 721, 723), thereby inevitably putting an upward pressure on price as demand increases. In sum, the pernicious effects on the competitive market are many, apparent, and long-standing.

See generally, E. Block and E. Olsen, Bibliography in Rent Control — Myths and Realities (1981) citing more than 200 articles to this general effect.

The Ordinance plainly prohibits price competition and thereby inhibits competition in other elements of the rental bargain including quality, service and safety. It freezes rents of 23,000 units essentially at their June 1978 levels and allows increases only at the pleasure of city officials. The law is so restrictive that owners seeking rent increases merely sufficient to amortize necessary capital improvements, even those required for the health and safety of tenants, are subjected to an elaborate administrative hearing process (in which they have the burden of proof) in order to be eligible for any rent increase at all.

Thus, even aside from the per se analysis of Berkeley's rent-fixing program, it can be seen that the Ordinance here challenged produces the type of anticompetitive effects in the marketplace which the Sherman Act seeks to prohibit. If the California Supreme Court's refusal to apply the rule of per se illegality to municipal price-fixing programs is allowed to stand, local governments will be free to disregard the strong federal policy favoring price competition in pursuit of any number of parochial political interests or asserted public welfare considerations.

It is important to recognize that such "public welfare" justifications do not begin and will not end with residential rent controls. Berkeley has already regulated rental prices for commercial property in certain neighborhoods, Elmwood Commercial Rent Stabilization and Eviction Protection Ordinance, Berkeley, California Ordinance 5468-N.S. (June 8, 1982), pursuing an interest unrelated to the purported justifications offered below. Under the rationale advanced by appellees and embraced by the court below, Berkeley and other cities will be equally free to regulate the prices of food products, clothing, health care services and automobiles, to name just a few, because their citizens "need" these products and services. The policies of the Sherman Act must not be so casually disregarded. Individual cities must not be permitted to establish themselves as economic islands sheltering themselves from the national environment of price competition which is so essential to the economic vitality of this nation. Clearly, then, the Berkeley Ordinance embodies a local program which, under preemption analysis, "stands as an obstacle to the accomplishment and execution of the full purposes and objectives . . ." of federal antitrust laws, *Hines v. Davidowitz,* 312 U.S. at 67; it mandates price-fixing which is illegal per se under the federal statute.

C. The Berkeley Rent Control Program Adversely Affects Interstate Commerce

It is axiomatic that Congress' power to regulate interstate commerce pursuant to Article I, § 8 of the Constitution is plenary. In enacting the Sherman Act, Congress "left no area

of its constitutional power unoccupied; it exercised all of the power it possessed." *United States v. Frankfort Distilleries,* 324 U.S. 293, 298 (1945).

In an authoritative analysis of the reach of Congressional jurisdiction under the commerce clause, *Perez v. United States,* 402 U.S. 146 (1971) (hereinafter "*Perez*"), held that interstate commerce was sufficiently involved in a single extortionate credit transaction which occurred wholly within one city. This Court ruled that if the class of activity involved substantially affects interstate commerce, then Congress can regulate the entire class and also reach individual incidents within the class even though a single individual incident does not in and of itself affect interstate commerce. 402 U.S. at 154; *see Wickard v. Filburn,* 317 U.S. 111 (1942) (wheat grown by one farmer wholly for home consumption purposes affects interstate commerce). *Wickard* and *Perez* are unquestionably applicable to the appraisal of interstate commerce in antitrust cases. *Mandeville Island Farm, Inc. v. American Crystal Sugar Co.,* 334 U.S. 219 (1948); *Burke v. Ford,* 389 U.S. 320 (1967).

The Sherman Act is intended to reach those restraints, such as the rent-fixing program here challenged, which occur wholly within one city or one state, but which substantially affect interstate commerce. *United States v. South-Eastern Underwriters Ass'n.,* 322 U.S. 533 (1944); *Goldfarb v. Virginia State Bar,* 421 U.S. 773 (1975); *McLain v. Real Estate Board of New Orleans,* 444 U.S. 232 (1980) (hereinafter "*McLain*").

Jurisdiction under the Sherman Act may be established by a showing that the allegedly anticompetitive conduct contemplated by the rent control ordinance has an interstate effect "as a matter of practical economics." P. Areeda, *Antitrust Law,* paragraph 232-1c (Supp.1982); *see also, Turf Paradise Inc. v. Arizona Downs,* 670 F.2d 813, 818 (9th Cir. 1982), *cert. denied* 456 U.S. 1011 (1982). Justice Lucas' dissent below eloquently describes as a practical matter of economics the serious anticompetitive effects of interstate proportions which directly

flow from rent control.[14] One of these, a retardation in the production of new rental housing, directly affects the demand for financing and title insurance. *McLain* leaves no doubt that such a private combination would be well within the reach of the Sherman Act; that the actor is the city does not change the impact of the price-fixing program on interstate commerce.

Any further doubt as to the effect of rental property on interstate commerce was laid to rest last Term by this Court's ruling in *Russell v. United States,* 53 U.S.L.W. 4652 (June 3, 1985). In *Russell,* the defendant was prosecuted under a federal statute, 18 U.S.C., § 844(i), for attempted arson of his two unit rental apartment building. This Court unanimously rejected Russell's argument that his rental units did not affect interstate commerce:

> By its terms, however, the statute only applies to property that is "used" in an "activity" that affects commerce. The rental of real estate is unquestionably such an activity. We need not rely on the connection between the market for residential units and "the interstate movement of people," to recognize that the local rental of an apartment unit is merely an element of a much broader commercial market in rental properties. The congressional power to regulate the class of activities that constitute the rental market for real estate includes the power to regulate individual activity within that class.

Russell, 53 U.S.L.W. at 4653 (footnotes omitted).

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[14] An analysis by the Construction Industry Research Board based upon U.S. Department of Commerce data and models, states that 38,513 fewer rental housing units were built in California in 1983 as compared to 1978. This represented a loss of $1.7 billion in construction and 47,300 fewer jobs in construction employment. Moreover, this decrease in rental housing production resulted in 69,500 fewer nonconstruction jobs in California and 34,200 fewer jobs outside of the state. A publication by the Bay Area Council of San Francisco entitled, *Rental Housing in California: Obstacles and Opportunites* (April 6, 1983) found that rent control is a major barrier to investment in rental housing development projects in California even in communities without rent control ordinances. Of the mortgage lenders surveyed, 82% agreed that "[r]ent control is a threat to any new multifamily project in California, no matter where it is located. . . ." J.S. App. H, A-147-48. The report found that rent control was by far the most frequently named disincentive for multifamily lending in California.

Whether we are dealing, as in *Russell,* with a federal statute prohibiting arson or, as in the case at bench, with the Sherman Act which prohibits the fixing of prices, it is clear that congressional legislation reaches the rental property market.

III. THE BERKELEY RENT CONTROL ORDINANCE IS NOT IMMUNE FROM FEDERAL ANTITRUST STATUTES IN THAT IT WAS NOT ENACTED PURSUANT TO A CLEARLY ARTICULATED AND AFFIRMATIVELY EXPRESSED STATE POLICY.

A. California Has No Clearly Articulated And Affirmatively Expressed Policy Regarding Rent Control.

It is now undisputed that municipalities such as Berkeley are prohibited from taking action which violates federal antitrust statutes unless such action is taken pursuant to a clearly articulated and affirmatively expressed state policy. *Boulder; Lafayette.* From a reading of the opinion of the California Supreme Court, below, it is obvious that this standard has not been met with respect to the Berkeley rent control measure.

The Court below recognized that "California has no state rent control statute," reaffirming an earlier California Supreme Court ruling conceding the absence of any state statute addressing rent control. *Birkenfeld v. City of Berkeley,* 17 Cal.3d 129, 141, 550 P.2d at 1010, 130 Cal.Rptr. at 474 (1976). This construction of state law by California's highest court is, at least, "instructive" in determining that there exists no clearly articulated or affirmatively expressed policy by the state, as sovereign, with respect to rent control. *Town of Hallie,* 53 U.S.L.W. at 4421, n. 8. Nevertheless, the California court ruled that even if a local government is not acting pursuant to a state policy, the per se rule of illegality does not apply to municipal price fixing, 37 Cal.3d at 751, J.S. App. A at A-1-2, and that municipalities can raise a "public welfare" defense to justify their anticompetitive regulations.

The Court below ignored the teachings of this Court and its carefully developed standards which reconcile interests of state sovereignty with national policies. As was recognized in *Lafayette,* 435 U.S. at 412-413, and reaffirmed in *Boulder,* 455

U.S. at 50-51, "Cities are not themselves sovereign. . . ." And as stated in *Lafayette,* 435 U.S. at 408:

> If municipalities were free to make economic choices counseled solely by their own parochial interests and without regard to their anticompetitive effects, a serious chink in the armor of antitrust protection would be introduced at odds with the comprehensive national policy Congress established.

In two recent cases, this Court has reaffirmed the *Lafayette-Boulder* standard and upheld governmental claims of state action immunity only where state legislatures had clearly articulated and affirmatively expressed sovereign policies authorizing the very anticompetitive conduct which was being challenged. *Town of Hallie,* 53 U.S.L.W. 4418; *Southern Motor Carriers,* 53 U.S.L.W. 4423.

In *Town of Hallie,* several unincorporated townships in Wisconsin filed a federal antitrust action against neighboring City of Eau Claire alleging that the latter violated the Sherman Act by monopolizing the provision of sewage treatment services and by tying such services to the provision of sewage collection and transportation services.[15] In that case, this Court identified, described and quoted from specific state statutes which granted authority to Wisconsin cities to construct, add to, alter and repair sewage systems and to determine the areas to be served. Wisc. Stat. Ann. § 62.18(1) 1982; 53 U.S.L.W. at 4420. Moreover, Wisconsin legislation expressly provided that cities "may by ordinance fix the limits of such service in unincorporated areas" and "shall have no obligation to serve beyond the area so delineated." Wisc. Stat. Ann. § 66.069(2)(c); 53 U.S.L.W. at 4420. Additional Wisconsin legislation authorized the State Department of Natural Resources to require that a city's sewage system be constructed so that towns may connect to the system, however, such an order by the Department shall be void if the unincorporated territory refuses to become

[15] It is important to note that in *Town of Hallie* and *Southern Motor Carriers,* the plaintiffs had filed federal antitrust actions against the defendants. Our case is substantially different; appellants here merely seek a declaratory judgment that the Berkeley Ordinance is preempted by the conflicting policies of the Sherman Act.

annexed to the city. Wisc. Stat. Ann. § 144.07(1); 53 U.S.L.W. at 4420.

Thus, Wisconsin, as sovereign, expressly authorized the City of Eau Claire to engage in the very conduct — provision of sewage and delineation of the areas to be served — which was the subject matter of the antitrust suit. Eau Claire was acting pursuant to the state policy which granted it authority to engage in the specific conduct for which it was being sued. In the instant case, however, the California Supreme Court has recognized that the State of California has no rent control statute. Here, there is no clearly articulated and affirmatively expressed state policy pursuant to which Berkeley would be authorized to impose rent control.

In *Southern Motor Carriers,* the United States brought a federal antitrust action against a rate conference for fixing the rates for intrastate transportation of general commodities in four southern states. Again, this Court found very specific state statutory authorization for the challenged conduct. The Court found that, in all four states (Georgia, Mississippi, North Carolina and Tennessee), by statute, common carriers are allowed to agree on rate proposals subject to further supervision and continuing regulation by the respective *state* public utility commissions. 53 U.S.L.W. at 4426. Thus, in all four states, the state legislatures, acting as sovereigns, had made the critical policy determinations necessary to invoke *Parker's* state action immunity, i.e., the decision to replace competition with a regulatory statute, 53 U.S.L.W. at 4426:

> The legislature thus made clear its intent that intrastate rates would be determined by a regulatory agency, rather than by the market.

The *Southern Motor Carriers* case represents this Court's most recent explication of the requisites for raising the state action immunity from antitrust laws and the reconciliation of antitrust and regulatory regimes at the state level. For immunity to exist, there must be express and affirmative state statutory provisions authorizing a policy of replacing com-

petition with regulation.[16] The four states in *Southern Motor Carriers* had enacted specific laws and policies at the state level demonstrating a commitment to regulation of intrastate rates (including the collective ratemaking practices, specifically authorized by the states, which were at issue in that case) instead of free and open price competition. *See also: New Motor Vehicle Board of California v. Orrin W. Fox Co.,* 439 U.S. 96, 109 (1978) where the Court found antitrust immunity in a state statutory scheme of regulation "designed to displace unfettered business freedom" with respect to establishment of new automobile dealerships. In the case at bench, however, California has adopted no such state legislative policy displacing competition in favor of rent control.

B. The California Legislation Relied Upon Below By Appellees Does Not Clearly Articulate Or Affirmatively Express A State Policy Authorizing Berkeley's Rent Control Ordinance.

In the proceedings below, appellees alluded to general housing statutes enacted by the State of California concerning a legislative scheme to plan and promote the improvement and development of housing.[17] Appellees contended that these statutes clearly articulated and affirmatively expressed a state sovereign policy pursuant to which the Ordinance was enacted.

A reading of these statutes makes it abundantly clear that they do not represent a commitment on the part of the legislature to displace competition with regulation in the rental housing marketplace, let alone to a regulatory program of rent control. Certainly appellees could not convince the California Supreme Court that these were rent control statutes. They do not clearly articulate or affirmatively express a state policy

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[16] As will be shown below, the existence of such an express state legislative policy satisfies only one of the two requirements of *Midcal.* To achieve immunity from federal antitrust laws, there must also be active *state* supervision of the anticompetitive practice. In *Southern Motor Carriers,* this supervision was abundantly present through *state* public utility commissions. In the instant case, there is absolutely no state supervision of Berkeley's rent control regulations.

[17] These statutes are set forth above in "Relevant Constitutional and Statutory Provisions Involved."

which authorizes Berkeley's fixing of rental prices for virtually every unit of private residential property within its jurisdictional boundaries. To hold that these statutes represent a state policy expressly displacing competition in favor of a regulatory regime would make a mockery of this Court's carefully developed standards for state action immunity from federal antitrust laws.

By their very terms, the California statutes cited by appellees and referenced above are *neutral.* The legislature in both its Government Code (§ 65589(b)) and in its Health and Safety Code (§ 50202) remained expressly neutral, at most, regarding the power of local governments to impose rent control; indeed in Health & Safety Code § 50202, the legislature stated: "Nothing in this division shall authorize the imposition of rent regulations or controls . . . [with limited exceptions not relevant here]". This legislative posture does not clearly articulate or affirmatively express a policy authorizing local rent control; indeed it would seem to do just the opposite.

In determining whether state legislation satisfies the clear articulation and affirmative expression standard, this Court has made it clear that a state posture of "neutrality" is not sufficient to confer antitrust immunity on locally mandated anticompetitive practices. Mr. Justice Brennan's opinion in *Boulder,* 455 U.S. at 55-56, is controlling in this regard:

> But plainly *the requirement of "clear articulation and affirmative expression" is not satisfied when the State's position is one of mere neutrality* respecting the municipal actions challenged as anticompetitive. A State that allows its municipalities to do as they please can hardly be said to have "contemplated" the specific anticompetitive actions for which municipal liability is sought. Nor can those actions be truly described as "comprehended within the powers granted," since the term, "granted," necessarily implies an affirmative addressing of the subject by the State. The State did not do so here: The relationship of the State of Colorado to Boulder's moratorium ordinance *is one of precise neutrality.* As the majority in the Court of Appeals below acknowledged: "[*W*]*e are here concerned with City action in the absence of any regulation whatever by the State of Colorado.* Under these circumstances there is no interaction of state and local regulation. *We have only the action or exercise of authority by the City."* 630 F.2d at 707. Indeed, Boulder argues that as to local matters regulated by a home rule city, the Colorado General Assembly is without power to act. Cf. *City of Lafayette, supra,* at 414, and n. 44. Thus in Boulder's view, *it can pursue its course of regulating cable television competition, while another home rule city can choose to prescribe monopoly service, while still another can elect free-market competition;* and all of these policies are equally "contemplated," and "comprehended within the powers granted." Acceptance of such a proposition—that the general grant of power to enact ordinances necessarily implies state authorization to enact specific anticompetitive ordinances would wholly eviscerate the concepts of "clear articulation and affirmative expression" that our precedents require. (Emphasis added.)

This language from *Boulder* is precisely and directly applicable to the present case. The statutory language of the State of California is expressly neutral at most — respecting local rent control. The state merely "allows its municipalities to do as they please" in imposing or not imposing rent control. Here, as in *Boulder,* we "have only the action or exercise of authority by the City." In California, one city may impose strict and widespread fixing of all rental prices (as does Berkeley), while another can impose less severe regulation, while still another can elect free-market competition. Under this system there is created a crazy-quilt of competitive and anticompetitive practices governing the same industry and affecting many others with no policy direction whatsoever from the state sovereign.

Under these circumstances, the strong and paramount federal economic policy favoring competition becomes subject to suspension not by virtue of the contemplative action taken by the state, based on a deliberate decision to substitute a regulatory regime for free market practices, but rather by one or more of the tens of thousands of local governmental units across the nation, acting upon some immediate parochial concern. In *Parker, New Motor Vehicle Board, Town of Hallie* and *Southern Motor Carriers,* the state legislatures involved made conscientious sovereign policy determinations to replace

free market pricing and other competitive practices with state supervised regulatory regimes. In California, the state legislature has adopted no such policy of replacing price competition with regulatory control of rental rates. The present situation approved by the court below is one empowering the cities to go about nonchalantly suspending free market pricing practices at will, whenever their parochial interests are furthered thereby.

In California, there is no state policy authorizing rent control, but rather a statutory statement that specifically withholds such authorization. Health & Safety Code § 50202. This is plainly sufficient to conclude that the state has not authorized rent control. To permit the state action immunity to shield Berkeley's non-state authorized rent-fixing program on such a tenuous or non-existent legislative foundation "would wholly eviscerate the concepts of clear articulation and affirmative expression" which are fundamental to the suspension of our federal commitment to competition, particularly price competition, as a basic national economic policy.

IV. THERE IS NO STATE SUPERVISION OF THE BERKELEY RENT CONTROL PROGRAM

Even accepting, *arguendo,* appellees' tenuous position, that the neutral California statutes clearly articulate and affirmatively express a state policy authorizing local rent control, state action immunity would still not be applicable as there is absolutely no state supervision whatsoever of Berkeley's program which regulates the prices which may be charged by private parties for rental housing. Nor are there even any state guidelines to moderate the most extreme impacts of the Ordinance on competition.

In *Midcal,* this Court established its two-pronged test for determining when governmental regulation of private conduct — such as in the instant case — is immune from federal antitrust laws. *Midcal* required both the clear articulation/affirmative expression of a state policy plus "active state supervision." 445 U.S. at 105. The instant case is identical to *Midcal* in many pertinent respects and, indeed, stronger in that unlike the *Midcal* plaintiff, appellants here challenge a municipal price fixing scheme rather than a *state* policy favoring regulation of liquor under the twenty-first amendment. Like *Midcal,* appellants here are not suing a governmental agency for violation of federal antitrust statutes, but merely seeking a declaratory judgment ruling that a governmental price-fixing program is in conflict with the letter and policies of Section 1 of the Sherman Act, hence preempted thereby under the supremacy clause. U.S. Const., Art. VI, Sec. 2.

Midcal's two-pronged test was expressly reaffirmed by this Court in *Southern Motor Carriers* last term. 53 U.S.L.W. 4423. In that case, the legislatures of the four states involved directed their respective state public utilities commissions to actively supervise and regulate the private rate setting activities. By contrast, in this case, there is absolutely no state supervision of Berkeley's rent-fixing program which regulates the pricing policies of rental property owners in Berkeley. Where, as here, a municipal regulation of private parties is involved, active state supervision must be shown. *Town of Hallie,* 53 U.S.L.W. 4418, 4421, n. 10. At the very minimum, state authorization for such a local price-fixing program should include guidelines and state supervisory powers to ensure that the state sovereign's purposes are being served without unnecessary conflict with the nation's economy.

V. THE COURT BELOW ERRED IN CREATING A "PUBLIC WELFARE" DEFENSE TO A LOCAL GOVERNMENT'S VIOLATION OF FEDERAL ANTITRUST LAWS AND POLICIES

The California Supreme Court quite simply refused to follow this Court's carefully developed standards for measuring the state action exemption from federal antitrust laws. Perhaps recognizing the patent lack of state authorization for appellees' price-fixing program, the state court ignored the forty-year history from *Parker* through *Lafayette* and *Bouider* culminating in *Town of Hallie* and *Southern Motor Carriers* which requires state authorization and supervision of local anticompetitive programs. Without such state participation, missing here, municipalities and their enactments enjoy no immunity from the Sherman Act.

Nevertheless, the court below focused on the perceived importance of a municipality's desire to implement rent control. In this respect, the lower court was misguided and failed fully to understand that this Court's test for the state action exemption is one which already establishes a delicate balance between local needs and federal antitrust policy. The "safety valve" for protecting local interests is found in the power of the state government to clearly articulate and affirmatively express the need for a regulatory regime to replace free market principles. This is evident in such cases as *Southern Motor Carriers* where the state legislature adopted a regulatory policy, replacing competition in governing transportation rates. *Parker* and *Town of Hallie* are to the same effect.

These cases illustrate the proper method for reconciling important local public welfare needs with national antitrust policy. It is for the state legislature, not a municipality, to define the "policy interest" to be served and to supervise actively the program established to prevent unauthorized anticompetitive practices from running rampant in excess of what is needed for the integrity of the regulatory program.

The state, however, has not adopted a policy to displace price competition with regulation with respect to the residential property rental market. It has neither authorized rent control nor established any system of active supervision of local rent-fixing programs. In short, none of the safeguards for reconciling a public welfare regulation policy with federal antitrust policy are present, and the California Supreme Court so conceded. Nevertheless, the court below, ignoring this Court's precedents, carved out a "public welfare" defense for the Berkeley's violation of the Sherman Act. What is most remarkable is that, in reaching its unsupportable conclusion upholding rent control, the court below completely disregarded

the traditional standards for either preemption or state action immunity, choosing, instead, to create a new judicial test:[18]

> Adapting the [United States Supreme] [C]ourt's commerce clause test to this facial section 1 attack on a municipal rent control ordinance, we conclude that if a municipal regulation has a proper local purpose, is rationally related to the municipality's legitimate exercise of its police power, and operates in an even handed manner, it must be upheld against a claim that it conflicts with section 1 of the Sherman Act unless the plaintiff demonstrates that the city's purposes could be achieved as effectively by means that would have a less intrusive impact on federal antitrust policies. (Footnotes omitted.)

37 Cal.3d 675, J.S. App. A at A-31.

This "test" is borrowed, in part, from the traditional approach used by this Court to determine if a state or local enactment constitutes an undue burden on interstate commerce in cases where Congress has been silent respecting the subject matter of the regulation. *See, e.g., Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970) and *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456 (1981). It is a test used to inquire whether Congress, by its silence, intended to permit local regulation or to adopt a uniform policy of nonregulation of the subject matter involved. Clearly, this approach has absolutely no applicability where, as here, Congress in the Sherman Act has expressly and adamantly prohibited price maintenance programs or schemes.

But the ruling below did not just apply the wrong test, it also modified the test to make it virtually inevitable that in every case local interests will override federal antitrust policy:

> We will, however, depart from the United States Supreme Court's commerce clause test in one significant respect. We will not apply the wide-ranging essentially standardless

[18] The state court acknowledged that its approach was novel, asserting that resolution of the antitrust issues forced it to "wander off the map and travel cross country without the benefit of trail or compass." 37 Cal.3d at 663, J.S. App. A at A-15. But the court's predicament was one of its own making; it refused to follow this Court's teachings and created its own unprecedented test.

cost-benefit analysis employed in the court's recent "balancing" decisions.

37 Cal.3d at 675, J.S. App. A at A-30. Thus, an anticompetitive municipal ordinance will stand unless a plaintiff can carry the burden of showing that the local interest can be achieved as effectively by a means that would have a less intrusive impact on competition. In short, the California court's test permits municipalities to violate federal statutory antitrust policy if that is reasonably necessary to achieve some real or imagined local interest. The test will apply not only to ordinances which fix rental rates but also to laws which fix the price of any other service or commodity deemed important to the local public interest.[19]

The *Midcal* case makes it clear, however, that there is no room for balancing local interests, regardless of their importance, against the strong congressional mandate prohibiting interference with price competition. Plainly, the so-called "negative implication of the commerce clause" test used by the state court has no place in determining whether a local ordinance is in conflict with express federal statutory language or policy. *Hines v. Davidowitz,* 312 U.S. 51 (1941); *Nash v. Florida Industrial Comm'n.,* 389 U.S. 235 (1967); *Jones v. Rath Packing Co.,* 430 U.S. 519 (1977); L. Tribe, *American Constitutional Law,* 6-2, 6-23 (Foundation Press, 1978).

This is not to say that some important local interests which require deviation from unfettered competition are unachievable. Indeed, this Court's prior rulings have provided the necessary "safety valve." If the state legislature, as sovereign, clearly articulates and affirmatively expresses a need to achieve a specific public purpose and chooses to accomplish that interest by limiting the forces of competition, even price

[19] The opinion below states that the "public welfare exemption would apply not simply to "traditional" or "integral" governmental functions, but also would immunize "all local actions rationally related to the promotion of local health, safety and welfare." 37 Cal.3d at 675 n. 27, J.S. App. A at A-31 n. 27. Thus, any city could fix the price of a myriad of commodities or services within the city limits, despite a negative interstate impact and a lack of state authorization or supervision.

competition, that state policy may be valid. *Parker,* 317 U.S. 341.[20]

Cities are not sovereigns and they are powerless to create a crazy-quilt of anticompetitive havens which are free from the coverage of federal antitrust policy. If rent control is important or essential to the public interest, advocates of such programs should direct their pleas and arguments to the state legislature, which in turn can strike the delicate balance between the perceived need for local price maintenance *vis a vis* the national importance of price competition. This is not a choice open to local governmental agencies or voters enacting laws through the initiative process, as was done here. For them it is all too easy to dismiss the long range importance and enduring value of competition in favor of urgent and immediate political or pocketbook pressures felt by a large body of tenant voters. The ruling of the California Supreme Court impermissibly permits these local, parochial interests and pressures to prevail over a national legislative policy which has guided this nation's economic destiny for a century.

[20] Legislatures in other states have clearly articulated and affirmatively expressed state policies authorizing local governments to enact rent controls. New York: N.Y. UNCONSOL. LAWS §§ 8581 et seq. (McKinney); Massachusetts: MASS. GEN. LAWS ANN. ch. 797, §§1 et seq. and 842, §§1-14 (West); New Jersey: N.J. STATS. ANN., §§2A, 42-74 and 42-77 (West); Maine: ME. REV. STAT. tit. 30, ch. 244. Appellants are aware of no municipality imposing rent control outside California without a specific state mandate to do so.

CONCLUSION

For the foregoing reasons, the decision of the California Supreme Court should be reversed and the Berkeley rent control ordinance declared preempted by the Sherman Act and unconstitutional pursuant to the supremacy clause.

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Respectfully submitted,

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